No. 80-1375

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MANUEL JUAN ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Bifulco v. *United States*, 447 U.S. 381 1

Blumenthal v. *United States*, 332 U.S. 539 3

Glasser v. *United States*, 315 U.S. 60 4

Holland v. *United States*, 348 U.S. 121 4

Jackson v. *Virginia*, 443 U.S. 307 ..... 4, 5

United States v. *Bailey*, 607 F. 2d 237, cert. denied, 445 U.S. 934 3

United States v. *Conroy*, 589 F. 2d 1258, cert. denied, 444 U.S. 831 3

United States v. *Griese*, 597 F. 2d 1170, cert. denied, 444 U.S. 979 5

United States v. *Gresham*, 585 F. 2d 103 5

United States v. *James*, 590 F. 2d 575, cert. denied, 442 U.S. 917 5

United States v. *Maultasch*, 596 F. 2d 19 5

United States v. *McCarty*, 611 F. 2d 220, cert. denied, 445 U.S. 930 3

United States v. *Michel*, 588 F. 2d 986, cert. denied, 444 U.S. 825 3

United States v. *Muller*, 550 F. 2d 1375, cert. denied, 434 U.S. 971 4

United States v. *Weaver*, 565 F. 2d 129 5

United States v. *Willaims*, 577 F. 2d 188, cert. denied, 439 U.S. 868 5

Page

Statute and rules:

21 U.S.C. 963 1

Fed. R. Crim. P. 35 1

Fed. R. Evid.:

Rule 103(a)(1) 5
Rule 801(d)(2)(B) 5
Rule 801(d)(2)(E) 5

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Petitioner claims that the evidence was insufficient to support his conviction for conspiracy to import marijuana.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963. He was sentenced to imprisonment for four years, to be followed by a two-year special parole term.[1] A panel of the court of appeals reversed, holding that the evidence was insufficient to support the conviction (Pet.

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[1]The petition for a writ of certiorari does not challenge the propriety of imposing a special parole term as part of petitoner's sentence for the drug conspiracy offense. In *Bifulco* v. *United States*, 447 U.S. 381 (1980), this Court held that a special parole term may not be imposed upon a defendant convicted of a drug conspiracy. Under Fed. R. Crim. P. 35, the district court retains power to correct this aspect of petitioner's sentence.

App. 1-13). Subsequently, the court of appeals *sua sponte* granted rehearing en banc and affirmed petitioner's conviction (Pet. App. 14-19).

The evidence at trial shows that in April and May 1978, co-conspirators John Cifarelli and Edward Peterson met with two undercover DEA agents, Charles Martinez and William Caton, to discuss a plan to transport a large quantity of marijuana from Colombia to Miami, Florida. At an initial meeting, the agents agreed to furnish the aircraft needed to transport the contraband. Subsequently, at a meeting on May 10, Cifarelli and another co-conspirator, known only as Nick, expressed a desire to show the agents a proposed landing area. Nick left the meeting, stating that he intended to contact the individual who had the field, and to get a key to the gate. Because Nick failed to return when expected, the two agents accompanied Cifarelli to an apartment house to look for Nick. Petitioner resided in one of the apartments at that address. When Cifarelli and the agents next saw Nick, he explained that the person he wanted to meet had stated that the proposed landing field was unacceptable. Five days later, the agents were shown an alternate landing site, located between a canal and cultivated land (Pet. App. 15-16).

The Colombian source, co-defendant Genaro Cruz, arrived in Miami on May 16, 1978, and spent the evening at petitioner's apartment. The next morning petitioner drove Cruz to the Opa-Locka airport. The truck driven by petitioner contained household appliances that Cruz intended to take with him to Colombia. Cifarelli and the DEA agents also arrived at the airport that morning. Cifarelli had told the agents that the Colombian source would meet them there. When petitioner's truck arrived at the location of the aircraft that the agents purportedly intended to fly to Colombia, Cifarelli introduced Cruz as the Colombian farmer who would furnish the marijuana, and identified

petitoner as the person who would be present at the off-loading site. Agent Martinez spoke with petitioner, asking whether he would be present at the off-landing site. Petitioner nodded his head affirmatively and smiled, and asked Martinez if he was going to be on the plane. Agent Martinez then talked with Cruz, who confirmed that he owned the farm where the marijuana would be obtained. After petitioner had loaded the appliances onto the airplane, the agents arrested petitoner and the other co-conspirators.

2. Petitioner claims that the evidence failed to establish that he was a knowing participant in the conspiracy alleged in the indictment. This contention, which involves the application of established principles of law to the facts of this case, was properly rejected by the en banc decision of the court below. Further review of this essentially factual issue is unwarranted.

It is well settled that a defendant's membership in an unlawful conspiracy is established by proof that he had a general knowledge of the overall purpose and scope of the conspiracy and voluntarily participated in it. See, *e.g., United States* v. *Bailey*, 607 F. 2d 237, 243 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States* v. *Conroy*, 589 F. 2d 1258, 1269-1270 (5th Cir.), cert. denied, 444 U.S. 831 (1979). The government need not prove that the defendant knew the identity or particular role of each of the other conspirators or knew the details of each of the conspirator's unlawful activities. See, *e.g., United States* v. *McCarty*, 611 F. 2d 220, 222 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980); *United States* v. *Michel*, 588 F. 2d 986, 995 (5th Cir.), cert. denied, 444 U.S. 825 (1979). As this Court explained in *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (footnote omitted):

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law

> rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all of its details or of the participation of others.

In this case, there is substantial evidence showing that petitioner was aware of and voluntarily participated in the conspiracy alleged in the indictment. When details of the original landing site were being discussed, a co-conspirator visited petitioner's apartment house to obtain critical information from one of the other conspirators. Thereafter, the Colombian drug dealer stayed at petitioner's house and was driven by petitioner to the final conspiracy meeting at the Opa-Locka airport, whereupon petitioner unloaded goods that were to be brought to Colombia as part of the conspiracy. Moreover, at that time, details of the conspiracy were openly discussed in petitioner's presence without fear of overhearing by hostile parties. And when a co-conspirator made reference to petitioner's role in the conspiracy, petitioner made no attempt to deny or explain this comment. Rather, he confirmed his involvement by indicating that he would be present at a location not customarily used for landing aircraft, at a time when the marijuana would be removed from an arriving airplane. Based on the totality of this evidence, the jury could reasonably have concluded beyond a reasonable doubt that petitioner knowingly and intentionally conspired to import marijuana into this country. See, *e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 319 & n.12 (1979); *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *Giasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Muller*, 550 F. 2d 1375, 1380 (5th Cir.), cert. denied, 434 U.S. 971 (1977).[2]

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[2]There is thus no substance to petitioner's contention that the court of appeals impermissibly relaxed the standard of proof in this conspiracy

Petitioner further contends (Pet. 5-6) that the government relied on co-conspirator Cifarelli's inadmissible hearsay statements. But petitioner failed to object to that testimony[3] and may not now be heard to complain. See, *e.g.*, Fed. R. Evid. 103(a)(1); *United States* v. *Gresham*, 585 F. 2d 103, 106 (5th Cir. 1978); *United States* v. *Maultasch*, 596 F. 2d 19, 24 (2d Cir. 1979). In any event, Cifarelli's inculpatory statements regarding petitioner and made in his presence were admissible against petitioner as adoptive admissions. See Fed. R. Evid. 801(d)(2)(B); *United States* v. *Giese*, 597 F. 2d 1170, 1195-1197 (2d Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Williams*, 577 F. 2d 188, 193-194 (2d Cir.), cert. denied, 439 U.S. 868 (1978); *United States* v. *Weaver*, 565 F. 2d 129, 135 (8th Cir. 1977). Similarly, the substantial independent evidence connecting petitioner to the conspiracy rendered Cifarelli's statement admissible as co-conspirator's declarations. See Fed. R. Evid. 801(d)(2)(E); *United States* v. *James*, 590 F. 2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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case. The court simply analyzed the totality of the evidence and determined that the government's proof amply supported the jury's verdict. See *Jackson* v. *Virginia*, *supra*. Petitioner challenges this factual conclusion by erroneously evaluating each item of evidence separately instead of viewing the proof as a whole.

[3]Contrary to petitioner's claim (Pet. 2), petitioner made no objection at the time this evidence was admitted (see Tr. 82, 102-103). After the government had rested, defense counsel moved to strike all evidence against petitioner because of a lack of proper foundation (Tr. 108-109).